United Nations **AT**

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1001

Case No. 1052: MIRANDA

Against: The Secretary-General of the United Nations

THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL,

Composed of: Mr. Kevin Haugh, Vice-President, presiding; Ms. Marsha A. Echols; Mr. Spyridon Flogaitis;

Whereas at the request of Barbara Miranda, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 28 February 1999 the time limit for the filing of an application with the Tribunal;

Whereas, on 23 November 1998, the Applicant filed an Application containing the following pleas:

"II. *PLEAS*

7. With regard to its competence and procedure, the Applicant respectfully requests the Administrative Tribunal *to find*:

...

(b) That the present application is receivable under Article 7 of its Statute.

8. On the merits ... *to find* that:

(a) The Applicant, by entering the service of the United Nations Secretariat on 1 September 1964, acquired the right to receive reimbursement for national income taxes paid on any lump sum payment she would receive from the United Nations Joint Staff Pension Fund;

(b) The Applicant's acquired right to receive reimbursement for national income taxes paid on any lump sum payment she may receive from the United Nations Joint Staff Pension Fund, was not revoked by Part III of the General Assembly resolution 34/165 of 17 December 1979, as stated in the final clause of this resolution;

(c) The Applicant's acquired right to receive reimbursement for national income taxes paid on any lump sum payment she may receive from the United Nations Joint Staff Pension Fund, obligated the United Nations Secretariat to inform all staff members of any changes in granting this right.

9. On the merits ... *to order*:

(a) The rescission of the decision dated 4 august 1998 rejecting the Applicant's request for reimbursement of income taxes on the lump sum withdrawal from the United Nations Joint Staff Pension Fund (...);

(b) Reimbursement to the Applicant in the amount of income taxes actually paid and not yet compensated on the lump sum withdrawal from the United Nations Joint Staff Pension Fund;

(c) The Applicant be reimbursed for interest on the amount from the date the taxes were paid until the date the reimbursement is received;

(d) The appropriate compensation be awarded the Applicant for the injury sustained by her in the amount of two years net base salary."

Whereas the Respondent filed his Answer on 30 August 2000;

Whereas the Applicant filed Written Observations on 24 October 2000;

Whereas the facts in the case are as follows:

The Applicant, a United States national, joined the United Nations on 1 September 1964 as an Editor, at the P-2 level, with the Language and Meetings Services Division, Office of Conference Services, on a probationary appointment. She received a permanent appointment on 1 September 1966 and was promoted to the P-3 level effective 1 July 1968. The Applicant was a participant in the United Nations Joint Staff Pension Fund (UNJSPF) from the inception of her

employment until her resignation from the Organization for personal reasons on 30 April 1970 at which time she withdrew her UNJSPF pension contributions in the amount of $4,605.36.

The General Assembly on 17 December 1979 adopted resolution 34/165, which provided in Part III that:

> "any staff member joining the United Nations Secretariat on or after 1 January 1980 shall not be entitled to receive reimbursement from the Tax Equalization Fund or otherwise for national income taxes paid on lump sum pension payments received form the United Nations Joint Staff Pension Fund; this decision will not affect staff members serving with the United Nations prior to 1 January 1980."

The Applicant rejoined the Organization on 3 January 1983 with the Editorial and Official Records Division, Department of Conference Services, as an Editor at the T II L level on a temporary short-term appointment. She was granted a probationary appointment on 1 January 1984, and received a permanent appointment on 1 September 1984. She was promoted to the P-4 level effective 1 April 1985 and to the P-5 level on 1 October 1993, and served until her separation from service, effective 31 March 1995.

On 27 July 1990, the Applicant applied to the UNJSPF for a restoration of her prior contributory service from 1 September 1964 to 30 April 1970, in accordance with Article 24 of the UNJSPF Regulations and her pension contribution for the years 1964 to 1970 was fully restored.

On 25 January 1994, the Applicant requested the Secretary, UNJSPF, for an estimate of her monthly pension and her lump sum payment at retirement at the age of 60, as well as other available options, information on post-retirement health benefits, social security entitlement and United States taxes. The Secretary, UNJSPF, replied on 2 February that he was unable to provide the information as yet, since the amount of her contributory service from 1 September 1964 to 30 April 1970 had not been incorporated in the1993 year-end closing of accounts. He would do so as soon as the records were updated.

On 9 May 1994, the Secretary, UNJSPF, advised the Applicant that after her retirement she would be entitled to full annual pension of $27,802, or a reduced annual pension of approximately $18,535 together with a lump sum payment of approximately $118,458. He further advised her that "the Office of Personnel in advance informs those staff members

anticipating retirement during the year of forthcoming seminars relating to pension … taxes, etc."

On 20 February 1995, the Applicant completed the UNJSPF Instructions for Benefit Payments, opting for a one-third lump sum payment. The instructions contained the following warning: "If you elect to commute part or the whole of your benefit into a lump sum, you will renounce all your rights to a minimum retirement benefit under Articles 28 (d) and 28 (e) of the Regulations."

The Applicant retired on 31 March 1995.

On 28 April 1995, the Secretary, UNJSPF, advised the Applicant in a letter that the arrangement had been made to remit to her a lump sum of $118,926, in accordance with her instructions of 20 February 1995, and that he would be glad to answer any questions that she might have with regard to her entitlement.

On 7 February 1996, the Applicant wrote to the Director, Accounts Division, Office of Programme Planning, Budget and Accounts, expressing her surprise at being informed that she would be reimbursed for United States income taxes on her lump sum pension only for the period from 1964 to 1970, but not for the period from 1983 to 1995. She admitted that she had been aware of the General Assembly resolution 34/165, but did not believe that it applied to her, since she was employed by the Organization prior to 1980, and that she would not have opted for a lump sum as part of her pension had she known that she would be ineligible for full tax reimbursement.

On 21 November 1996, the Applicant appealed to the JAB contesting the decision to deny her full reimbursement for the lump sum pension payment received, and distinguishing her case from Tribunal Judgement No. 634 *Horlacher* (1994).

On 22 December 1996, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 1 December 1997. Its considerations and recommendations read as follows:

"***Considerations***

…

19. The Panel first discussed the issue of receivability as raised by the Respondent. It decided to exceptionally waive the time-limits as prescribed in Staff Rule 111.2(a) …

20. Concerning the substance of the appeal, the Panel referred to *Horlacher*…

21. The issue before the Panel … was whether the Appellant was serving on 1 January 1980. The Appellant claimed that, since she had been given a second permanent appointment in 1984, she had thus been reinstated and her acquired right remained valid. The Respondent asserted that she had re-entered the Organization under a new employment contract in 1983 after a break of approximately thirteen years.

22 The Panel carefully studied the Appellant's employment history ... It found that the Appellant had resigned from the Organization in April 1970, and had re-entered the service of the United Nations after a thirteen-year hiatus.

23. The Panel noted that the Appellant had received another permanent appointment in September 1984. It also noted that her pension had been fully restored in 1990. Those two facts no doubt contributed significantly to a misunderstanding on the part of the Appellant that she had in fact been reinstated as a staff member (and not just for purposes of the pension fund), and to her belief that the General Assembly resolution 34/165 therefore did not apply to her, since it did not refer to the issue of reinstatement.

24. The Panel realized that it was incumbent on the Appellant to find out about the tax problems in connection with her retirement benefits. However, it also recognized that there was responsibility on the part of the Organization to alert the Appellant to the special tax problems in store for her if she would opt for a one-third lump sum pension on retirement, instead for merely sending out boilerplate letter. In the Panel's opinion, such more personalized information could have been provided at no or little additional cost to the Organization, but would have been enormously valuable to the Appellant. It might even have prevented the present case from ever becoming an appeal altogether.

…

Recommendations

26. In light of the foregoing, the Panel *unanimously recommends* that the Administration accept its role in creating this situation for the Appellant, and make a restitution of one third of the income taxes (USD 36,486.02 according to her calculation) that the Appellant had paid on that portion of her one-third lump sum pension benefits attributable to her service for the period from1983 through 1995, subject to the production of satisfactory evidence establishing the amount paid of the said income taxes.

27. The Panel makes no recommendation in support of the other monetary reliefs sought by the Appellant."

On 4 August 1998, the Under-Secretary-General for Management transmitted to the Applicant a copy of the JAB report and informed her as follows:

"...

The Secretary-General ... has taken note that the Panel decided to exceptionally waive time limits and to consider your appeal receivable.

He has also taken note of the Panel's determination that the pivotal issue before it was whether you were serving as a staff member on 1 January 1980, and its finding that you were not, and that any belief on your part that you should be considered to have been serving on that date was a misunderstanding. The Secretary-General is in agreement with the Panel that you were not and could not be considered to be serving as a staff member on 1 January 1980 and that, therefore, in accordance with General Assembly resolution 34/165 as interpreted by the Administrative Tribunal in the case of *Horlacher*, you were not entitled to reimbursement for income taxes paid on lump sum pension benefits attributable to your service with the Organization after 1980.

Although the Panel concluded that you were not *entitled* to the reimbursement in issue, it nevertheless recommended that you receive reimbursement, under the rationale that the Organization had a responsibility to alert you to the special tax problems facing you upon election to receive a one-third lump sum commutation of your pension benefit and that the Organization did not meet this responsibility. The Secretary-General is not in agreement with this conclusion of the Panel. The Organization has a responsibility to provide information to its staff members but staff members also have an obligation to keep themselves informed and to seek clarification whenever needed. The Secretary-General has found that it was your responsibility to ask the appropriate offices in advance for clarification of the consequences of your preference for a one-third lump sum commutation of your pension benefit on retirement. In a communication to you from the Secretary of the Pension Fund dated 9 May 1994, you were specifically directed to the seminars of the Office of Personnel for a discussion and opportunity to ask questions regarding retirement issues, including tax issues. The Secretary-General has carefully considered your argument that you were not put on notice of the need to ask questions. In this regard, *inter alia*, you stress that the 'reinstatement' of your pension back to 1964 let you to believe that you were reinstated for all purposes, including being considered as a serving staff member on 1 January 1980 for purposes of General Assembly resolution 34/165. The Secretary-General has found that, irrespective of any other factor, the entry on duty date of 1983

on your personnel action forms should have created a doubt in your mind and put you on notice of the need to seek clarification.

The Secretary-General has taken note that the Panel made no recommendation in support of the other monetary reliefs sought by you in your appeal.

Taking into consideration the strict prohibition of General Assembly resolution 34/165 and the considerations discussed above, the Secretary-General has decided not to accept the recommendation of the Panel regarding restitution and to take no further action in your case.

..."

On 23 November 1998, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Applicant's acquired right to receive reimbursement for national income taxes paid on any lump sum payment she may receive from the UNJSPF obligates the United Nations to inform its staff members of any changes in granting this right.

2. By entering the service of the United Nations Secretariat on 1 September 1964, the Applicant was entitled to full reimbursement for national income taxes paid on the lump sum payment received.

3. The Applicant's right to receive reimbursement for taxes paid on her lump sum payment was not revoked by Part III of the General Assembly resolution 34/165 of 17 December 1979.

4. The Applicant's case is different from that of *Horlacher* and should be decided differently.

Whereas the Respondent's principal contentions are:

1. The Applicant was not entitled to reimbursement for U.S. income taxes on the lump sum pension benefit she received in respect of her employment with the UN after 1 January 1980.

2. The Administration did not breach any obligation to provide information to the Applicant.

The Tribunal, having deliberated from 26 June to 23 July 2001, now pronounces the following judgement:

I. The Applicant asks the Tribunal to rescind the decision of the Administration that deny her the reimbursement of United States income taxes paid on the lump sum withdrawal from the Pension Fund in connection with her re-employment after 1 January 1980. Her claim is based on a misinterpretation of the second clause of General Assembly resolution 34/165 of 17 December 1979 and an attempt to distinguish her case from Judgement No. 634, *Horlacher* (1994). The Tribunal finds that the Administration properly denied the reimbursement and that *Horlacher* applies.

II. The Applicant's claim turns on the interpretation of the following language from resolution 34/165.

> "... any staff member joining the United Nations Secretariat on or after 1 January 1980 shall not be entitled to receive reimbursement from the Tax Equalization Fund or otherwise for national income taxes paid on lump sum pension payments received from the United Nations Joint Staff Pension Fund; this decision will not affect staff members serving with the United Nations prior to 1 January 1980."

III. The ambiguity of this language was addressed and resolved by the Tribunal in *Horlacher*, which referred to the years of discussions on tax reimbursement described in Judgement No. 237, *Powell* (1979). *Horlacher* also involved a retiree with a period of service before 1 January 1980 and re-employment after that date. Noting the aim of the General Assembly to discontinue income tax reimbursement while protecting those serving when the resolution became effective and continuing in service, the Tribunal decided that the

> "persons to be adversely affected by this discontinuance were all who joined the staff on or after 1 January 1980. But there was obviously concern about providing a degree of protection for persons who were serving staff members on that date. Nothing before the Tribunal suggests that this concern related to individuals who were not then [on 1 January 1980] serving staff members of the Organization, but who at some time in the past, whether briefly or not, had been staff members, or that there was any reason for such a concern." (para. XI)

It should be noted that in two other decisions, Judgement No 373, *Saddler* (1986) and Judgement No. 320, *Mills* (1983), the Tribunal ruled against claims for reimbursement made by applicants who had been in service but were no longer employed on 1 January 1980. Although those cases are somewhat different factually from the matter under consideration, they confirm the position of the Tribunal.

IV. The Applicant was in service from 1 September 1964 until 30 April 1970, during which time she participated in the Pension Fund. She re-entered the service on 3 January 1983 and arranged for the restoration of her pension benefits. This second period of employment was a "re-employment". *See, Horlacher*, para. V. She retired effective 31 March 1995. Thus, on 1 January 1980 she was not employed by the organization.

The Applicant withdrew part of her retirement benefits as a lump sum payment, according to her with the "understanding" that she was entitled to full tax reimbursement. She was aware of General Assembly resolution 34/165, but "did not consider that it did apply to her", since she had entered the Organization before 1980. As occurred in *Horlacher* the Applicant was reimbursed for income taxes paid on that part of the lump sum attributable to her first period of service.

V. The Applicant argues that the administration is legally bound to reimburse her nevertheless, primarily because of what might be described as lack of adequate notice or "lack of precise information" about the split rule on reimbursement, which she says occasioned a heavy financial loss. She asserts that *Horlacher* is distinguishable on the facts, because in that case the employee had received notice of the non-reimbursement rule before he retired, whereas she learned of the rule only after her separation. The JAB found that there was a "responsibility on the part of the Organization to alert the [Applicant] to the special tax problems in store for her if

she would opt for a one-third lump sum pension on retirement, instead of merely sending out boilerplate letters ... [S]uch more personalized information ... might even have prevented the present case from ever becoming an appeal altogether." As a consequence the JAB recommended that the administration make a partial restitution of the taxes that were not reimbursed.

VI. The Tribunal finds that, while the memorandum from the administration might leave something to be desired, it alerted the Applicant to seminars for staff anticipating retirement where matters related to pension, insurance, taxes and other issues would be discussed. She did not attend, although those seminars would have presented the opportunity to learn more and to ask questions about her particular circumstances. Having failed to avail herself of these opportunities, she cannot now claim lack of personalized information or failure to provide other than generalized information. Nevertheless, the Tribunal agrees with the JAB that a matter such as this should not have reached this stage as a dispute.

VII. The Applicant also supports her application with an argument regarding rights she believes she acquired during her first period of employment with the United Nations, which she says, even under resolution 34/165 carried over to her re-employment under a different contract. Similar claims were rejected in *Horlacher*. In that case the Tribunal refused to accept the "extraordinary proposition that the General Assembly, by the second clause of the resolution, wished to confer a potentially large windfall benefit on anyone appointed after 1 January 1980 who, although not in service at the time the resolution took effect, had served, however briefly, at any time in the past." (para. XI) This statement is an implicit rejection of the acquired rights argument in the facts of that case. The position of the Tribunal in *Horlacher* and here accords with case law. As stated for example in Judgement No. 82, *Puvrez* (1961), which is quoted in *Powell*,

> "Respect for acquired rights also means that the benefits and advantages accruing to a staff member for services rendered before the entry into force of an amendment cannot be prejudiced. An amendment cannot have an adverse retroactive effect in relation to a staff member, but nothing prevents an amendment to the Staff Rules, where the effects of such amendment apply only to

benefits and advantages accruing through service after the adoption of such amendment." Judgement No. 82, para. (1961)

VIII. The Administration properly treated differently the first and second periods of service by the Applicant. Regarding the first contract, her acquired rights were respected and she was reimbursed for the relevant income taxes paid. Regarding the second contract, the second clause of resolution 34/165 was properly applied to her new (post 1 January 1980) contract. In sum, as the Tribunal concluded in *Horlacher*, "principles relating to acquired rights are not dispositive in this case." (para. VII). "The Applicant here is being reimbursed for taxes on the portion of [her] lump sum pension payment that is allocable to [her] service with the United Nations prior to 1 January 1980, and that is all that [she] is entitled to. For [her] to receive a greater tax reimbursement would unjustifiably distort the purpose of the General Assembly in adopting resolution 34/165." *Id.*, para. XIV.

IX. For the foregoing reasons, the Application is rejected in its entirety.

(Signatures)

Kevin HAUGH
Vice-President, presiding

Marsha A. ECHOLS
Member

Spyridon FLOGAITIS
Member

Geneva, 23 July 2001

Maritza STRUYVENBERG
Executive Secretary